Supreme Court, U.S
FILED

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No.

IN THE

Supreme Court of the United States

RUBY HOWARD,

Petitioner,

v.

THE NEW YORK TIMES COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RUBY HOWARD
Petitioner pro se
400 Matawan Avenue
Ken Gardens #18A
Cliffwood, NJ 07721
(732) 290-7388

THE REPORTER COMPANY, *Printers and Publishers, Inc.*
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QUESTION PRESENTED

Whether a federal Court of Appeals in complete disregard of the limits of federal question jurisdiction previously established by the United States Supreme Court can affirm res judicata in absence of jurisdiction thus preventing any further litigation without permission from the federal courts?

Table of Contents

Page

Question Presented i

Table of Contents ii

Table of Citations iv

Table of Contents to Appendix v

Opinions Below 1

Statement of Jurisdiction 1

Constitution and Statutory Provisions Involved 1

Statement of the Case 2

A. Factual Background 3

B. The Proceedings Below 6

Reasons for Granting the Writ 20

I The Petition Should Be Granted Since the Opinion Below Defies And Exceed The Limits of Federal Question Jurisdiction Previously Established By The Court In Griggs V. Duke Power Company 20

II The Petition Should Be Granted Because The Supreme Court Must Exercise Its Supervisory Power When A Court Of Appeals Departs So Far From The Usual Judicial Process That It Affirms An Abuse Of Jurisdiction That Denies And Violates Due Process Rights, Undermines Congressional Intent and Obstructs Justice 22

III Petition Should Be Granted In The Public Interest Of Other United States Citizens Who Stand To Be Similarly Harmed By Federal Courts That Abuse Jurisdiction And Deny And Violate Fundamental Due Process Rights 24

Conclusion 28

TABLE OF CITATIONS

Cases Cited Page

Anderson v. City of Bessemer City, 470 U.S 564, 105 S. Ct. 1504, 84 L. Ed.2d. 518 (1985) 8

Bakke, 438 U.S, at 289-290 27

Bank of Columbia v. Okley, 17 U.S (4 Wheat) 235 [(1819)] 9

Bennett v. United States Lines, 64F 3d 63,66 (2nd Cir. 1995) 9

Griggs v. Duke Power Co., Sup Ct. 1971, 401 U.S. 424, 91 S. Ct. 849, L. Ed.2d. 158 ..... 4, 20

International Bhd. of Teamsters v. United States, 431 U.S. 324, 325n 15, 97 S. Ct. 1848, 1854, n 15, 52 L Ed. 396 (1977) 2

New York Times Co. v. Sullivan,376 U.S 254, 84 S. Ct. 710,11 L. Ed.686 (1964) 27

Norwalk CORE v. Norwalk Redevelopment Agency, 395 F. 2d. 920, 931 (2d Cir. 1968) 27

Toledo Newspaper Co. v. U.S., 247 U.S, U.S 402, 38 S. Ct. 560, 62 L. Ed. 1186. *See* 18 USCA §1501 *et. seq.* Model Penal Code 242.1 *et. seq.* 8

United States Constitution Cited

Fourteenth Amendment 1, 2, 11, 19, 21, 22, 26, 27, 28

Rules Cited

Fed. Rule of Civ. Procedure 4 8

Fed. Rule of Civ. Procedure 16 (a) 7

Fed. Rule of Civ. Procedure 16 (d) 6, 7

Fed. Rule of Civ. Procedure 26 9

Fed. Rule of Civ. Procedure 26 (a) (3) 6

Fed Rule of Civ. Procedure 26 (f) 6

Fed. Rule of Civ. Procedure 52 8

Fed. Rule of Civ Procedure 56 ..... 7, 26, 27

Table of Contents to Appendix

Unpublished Opinion, United States Court of Appeals for the Second Circuit, Decided May 8, 2001 ..... A1

Opinion of the United States District Court for the Southern District of New York Filed August 15, 2000 ..... A4

Opinion of United States District Court
Southern District of New York of
March 27, 1987 ..... A6

Court of Appeals Order Denying Motion for
Reconsideration dated June 20, 2001 ..... A20

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Second Circuit entered on May 8, 2001 is not published. The Opinion of United States District Court for the Southern District of New York August 15, 2000. Opinion of United States District Court Southern District of New York of March 27, 1987.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on May 8, 2001. The Court of Appeals denied a timely petition for rehearing on June 20, 2001.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides:

All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and the state wherein they reside. No state shall deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statute Cited

Title VII of the Civil Rights Law of 1964

STATEMENT OF THE CASE

The fundamental question in this case is why should employer promote a minority employee to a new position in another department of the company, only to have her removed from that position under false pretenses, and have job given to her white co-worker who was less qualified for the job, when her former department, the Information Bank (Info Bank) became automated, even though company policy provides for the finding of comparable jobs in other departments for all tenured employees. The Fourteenth Amendment states there should be "equal protection under the law for all its citizens," and in Title VII of the Civil Rights Law of 1964, petitioner suffered "disparate treatment" when her job was switched to a white co-worker with less seniority and qualification. Furthermore, the Index department to which plaintiff was transferred had only four minority indexers as opposed to thirty-five to forty white indexers at that time, and two white employees from the Info Bank who were also copy checkers, were promoted from plaintiff's department in a similar manner without any objection or interference from her department head, who intentionally tried to sabotage her promotion by stating among other things, that plaintiff was not interested in being promoted, without seeking her opinion in the matter. (*International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n. 15, 97 S. Ct. 1848, 1854, n. 15, 52 L. Ed. 396 (1977). Employer intentionally disseminated malicious memorandum of November 6, 1976, with false allegations to personnel marring her reputation, thereby preventing her from being transferred to other departments and misrepresented employee's work ethics which caused medical director to physically and recklessly harmed petitioner by tearing her right meniscus while she was recuperating from major scoliosis spinal surgery and wearing a complete back brace, although company has no policy of

examining employees after returning to work from surgery and her surgeon warned against it. Title VII Law emphasizes a work environment free of hostility and the Fourteenth Amendment Clause provides for "equal protection and due process under the law." The idea of having employer blatantly violate these doctrines by treating an employee of color disparately different from her white counterpart, is a thought to grapple with. To fully appreciate the significance of the issues presented in this case, it is essential to consider the underlying facts and procedural background.

A. FACTUAL BACKGROUND

In Dec. 1985, petitioner filed suit in the Southern District Court of New York against employer, The New York Times for causes of action that had arisen out of defendants wrongful acts in dismissing petitioner from her job on August 6, 1985. A Right to Sue Letter was issued by the New York Human Rights Commission (NYHRC) on November, 4, 1985, after plaintiff filed complaint in early October 1984, because of daily harassment and constant dismissal from her job since her return to work on August 6, 1984, and while she was recuperating from major spinal surgery of May 4, 1984. The case grew out of an original complaint she filed in 1976, with the NYHRC against employer who promoted her to an indexing position in the Index department only to have job switched to a white co-worker of her former department, the Info Bank, when that department became automated weeks later and relocated to New Jersey, making her job as copy checker obsolete. Info Bank supervisor, Robert Olsen who returned to the Index department after automation in 1975, would frequently remark in the Info Bank, that while he did not object to having "blacks work in the factories" of his northern Westchester neighborhood, he did not want to have them "live there," convinced the

manager of the Index department that petitioner was not interested in being promoted, therefore job should be given to white co-worker instead, and manager Lloyd Franke, capitulated. Franke administered a test in which petitioner was given difficult political and international stories to abstract and co-worker given routine stories like marriages, deaths and cooking to abstract for a period of four weeks. At the end of which time, the person completing twenty-five stories daily was chosen for the job. It was unknown to petitioner that she was competing with co-worker for the same job.[1] Two prior white employees from the Info Bank, went directly into a training program in the Index department, which was that department's policy. Petitioner was relegated to clerical work and not given a chance to be transferred elsewhere in the company, although the prevailing policy dictated comparable transfer for tenured automates. *See Griggs v. Duke Power Co.*, Sup Ct. 1971 401 U.S. 424, 91 S. Ct 849, L.Ed. 2d.158.

The Newspaper Guild was unable to come to terms with the department and recommended that petitioner complained to the Human Rights Commission. The department fired back by substituting the work of a veteran indexer covering politics and international stories to the Commission, as that of work done by co-worker to prove that she did more quantitative and qualitative work than plaintiff, as well as submitting false

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[1] Within a year after co-worker became indexer, she received a degree in Accounting and was transferred to the Accounting department. Index department manager, Lloyd Franke was heard to remark to co-worker, "after all we have done for you, you have decided to leave us." She eventually left the company shortly thereafter. Plaintiff trained co-worker as copy checker in the Info Bank.

affidavits with one coming from co-worker herself, to substantiate its claim. The complaint was immediately dismissed. When plaintiff questioned how dismissal came about without an investigation, the Commission sent a Determination stamped with the then Commissioner Mrs. Norton-Holmes' signature, stating complaint was baseless. The EEOC whom I had not contacted sent a Right to Sue Letter, but plaintiff did not act upon it, because she did not want to become embroiled in a lawsuit.

Plaintiff was pro se, and filed "disparate treatment" causes of action under Title VII of the Civil Rights Law of 1964, when job was switched to white co-worker, but her complaint was deflected with false and defamatory memoranda, deceptive and fraudulent acts by defendants and she received no briefs or documents defendants submitted to the court. Defendants took the matter to arbitration and completely shut out plaintiff from those proceedings, only inviting her to the 1st proceeding in which she testified. Plaintiff prayed for punitive and compensatory damages for intentional wrongs, damages for harassment, demoting and subjecting her to disparate discipline by harming her person while she was recuperating from major spinal surgery. Manager, Harvey Holmes sent memorandum dated January 24, 1985, to medical director defaming petitioner's work ethics, which was instrumental in having doctor intentionally and recklessly hammered her right knee and tore meniscus on February 13, 1985 when knee jerk was not possible because muscles had atrophied from recent surgery by removal of bone from her right pelvis which remained unhealed. Defendant tried to recruit another doctor in the medical department, to harass plaintiff by telling doctor that plaintiff was "delusional" and would oftentimes "speak to God" in the office, but she left the company rather than being subjected to defendant's wishes.

Because of Franke's false and defamatory memorandum of November 6, 1976, which not only attacked petitioner's character, but caused her to be rejected from working in other departments, as she was labeled a "troublemaker," petitioner was not allowed the liberty and diversity other employees enjoyed in gaining experience elsewhere. These documents were however, expunged by the Newspaper Guild, but it was too late to be effective, because the damage was already done.

B. THE PROCEEDINGS BELOW

On June 16, 1986, plaintiff met with Judge Gerard Goettel for a pretrial conference along with The New York Times labor attorney Marcijane Kraft in his chamber. Upon meeting Judge Goettel, he expressed his dislike for pro se litigants. Somewhat taken aback, I assured him that I would defend myself to the best of my ability. With nothing more to say he told me I could leave, which I did. Ms. Kraft was still sitting when I left. In his handwritten Pretrial Scheduling Order of June 16, 1986, Judge Goettel wrote, filing of motions for dismissal should be made "within thirty days after arbitration decision," completion of discovery and final pretrial conference would take place on "October 16, 1986." None of these facts were disclosed to me and because I received no briefs or documents defendants submitted to the court, I was unaware we were in the discovery procedure. At no time was I ever contacted or met with defendant under Fed. Rule of Civ. Proc. 26 (a) (3), and formulated no discovery plan. Plaintiff however, telephoned attorney, John Stanton's office, but he never returned the call. Under Fed. Rule of Civ. Proc. 26(f) there was no joint report outlining a discovery plan, that should have been submitted to the courts within 10 days after meeting between defendant and plaintiff, as no such meeting took place. Plaintiff did not receive a copy of Judge Goettel's Scheduling Order as Rule 16

(d) prescribes. Because plaintiff was not sent any summary judgment motion, Fed. Rule 56 was violated. Plaintiff was not invited to attend post pretrial conference thus violating 16 (a) doctrine. If the right to fundamental fairness and due process is to be meaningful, the federal court has an obligation to extend fairness across the board, i.e, the court cannot affirm the same set of circumstances for one side and reject it for the other, especially in the face of that side violating all the Fed. Rules of Civ. Proc. governing pretrial and discovery doctrines. After the pretrial conference, I received a form letter from the clerk of the court requesting whether I wanted to have my case heard in White Plains instead of the Southern District to which I answered "no." That answer was completely ignored.

On November 12, 1986, I sent a brief to the court disclosing that The Times was engaged in fraudulent acts. That prompted a response from the court to state that a November 22 deadline was set for final briefs. On November 22, 1986, plaintiff presented a final brief to the court, detailing her case and introducing documents covering her surgery and office injury. At one minute to midnight defendant's messenger service arrived at my home with three to four bulky Arbitration transcripts. No briefs accompanied them. Next morning plaintiff telephoned to presumably Judge Goettel's NYC chamber to complain about not receiving defendant's brief. Nothing was done about the matter. I was misled, since Goettel had already penned "October 16," as the final date of discovery, so by submitting my brief on November 22, it would have been too late for any action as date earmarked for final briefs had been met.

Around the 1st week of April 1987, plaintiff received a Summary Judgment dated March 27, 1987, from Goettel's White Plains court. I immediately filed a motion on April 5,

1987, requesting that Judgment be set aside as I received no affidavits or motion to dismiss, and thus summary judgment could not be considered legitimate or valid. This action falls under the "clearly erroneous" standard (Rule 52, Fed. R. Civ. Proc., *Anderson v. City of Bessemer City*, 470 U.S. 564, 105 S. Ct. 1504, 84 L. Ed. 2d. 518 (1985). There was no reply from the court.

On appeal to the Second Circuit Court, plaintiff's Notice of Appeal was illegally removed from the pro se's office by defendant and forwarded to Goettel's White Plains court. Notice for motion of appeal was filed requesting a 30-day extension, which the court granted to August 27, 1987. The purpose for extension was to retain an attorney, but because plaintiff needed urgent medical treatment to office injury to right knee, and funds were diverted for that purpose, plaintiff was forced to proceed as pro se. On July 27, 1987, she re-scinded extension so case could continue. Notice of Motion to Appeal, Notice for Excusable Neglect and Notice of Appeal all dated July 27, 1987 were completed and returned to the pro se's office. However, documents were removed by defendant and forwarded to Goettel's court along with defendant's "Memorandum of Defendant" dated July 29, 1987 without furnishing a copy of said document to plaintiff and obstructing justice. *Toledo Newspaper Co v. U.S*, 247 US, U.S 402, 38 S. Ct. 560, 564, 62 L. Ed 1186. See 18 USCA §1501 *et seq*, Model Penal Code 242.1 *et. seq*. Undoubtedly, Judge Goettel had to be aware that documents were not meant for him since Notice for Appeal called for a hearing to be held in his court on August 14, 1987, pursuant to Rule 4 of the Fed. Rules of Civ. Proc. On August 15, 1987, the Circuit Court reported, "we do not have record of NOA on this," referring to plaintiff's case. By August 19, 1987, Judge Goettel ordered time-barred on documents which defendant urged him to act upon.

On November 30, 1987, defendants filed motion to dismiss when plaintiff refiled appeal in Circuit Court by stating they had my consent when I was not informed about their action. How, in the face of all these blatant obstructions of justice could anything legitimately be followed through when defendant deceived, defrauded and concealed the truth, thereby altering the course of events in this case is incomprehensible. *Bennett v. United States Lines*, 64 F. 3d 63, 66 (2nd Cir. 1995).

The federal district court in its recent Report and Recommendation concurred with Judge Goettel that a prima facie case was not developed, but only mentioned in its footnotes documents plaintiff presented to that court confirming the fact that defendant furtively removed material intended for the Appellate Court. The crux of the matter is, can the federal court rid itself of its bias mentality and be more diligent in its cause for the truth rather than favoring big businesses. How could a prima facie case be objectively developed when I was denied access to what defendant had to say and documents it provided the court, violating the discovery doctrine; was shut out of five arbitration proceedings violating the Fair Labor Practices law and was unable to challenge false affidavits and memoranda which were presented to the court without my knowledge. By using Judge Goettel's decisions which have no integrity, as a security blanket, defendants arrogantly evade the truth and prevent plaintiff from seeking justice. It is disturbing that the court accepted defendants' affidavits as proof of service when defendants have a history of presenting false affidavits and at no time did they provide a certified mail receipt to prove that any mailing was sent to plaintiff's home, which would confirm that she received motion for summary judgment. In the opinion of Justice Johnson in *Bank of Columbia v. Okley*, 17 U.S. (4 Wheat) 235 [(1819)] which states, "we have

emphasized time and again that 'the touchstone of due process is protection of the individual against arbitrary action of government,' whether the fault lies in a denial of fundamental procedural fairness or the exercise of power without any reasonable justification in the service of a legitimate governmental objective."

The judicial system fails when its judges are apt to place a seal of approval on a colleague's work without trying to find out how the decision was arrived at, and the process becomes myopic when it erroneously rules in favor of big businesses without fully reviewing the evidence on both sides objectively.

If, as Goettel asserted that plaintiff did not develop a prima facie case, why was defendant given the opportunity to wage a strong defense without allowing plaintiff to respond to those charges, and why was not the case dismissed after the pretrial conference held on June 16, 1986, when Goettel biasly declared his displeasure for pro se litigants. Neither was there any mention made of this on his Schedule Order of June 16, 1986. Instead his notes revealed, he was committed to continue case by holding a post pretrial conference as well as discovery without informing plaintiff of these events. Goettel also noted that at the end of Arbitration proceedings, motion to dismiss should be filed. Obviously, there was a concerted effort by himself and defendant to keep plaintiff at bay, so she would not be apprized of their malfeasance. How could a judge suggest motions to dismiss immediately after arbitration if it was not conveyed to him beforehand that defendant would be successful in said arbitration. So hypocritically, and in his strongest objections, he rejected my case by pretending not to know the goings on, when he was one of the architects in this scenario.

The Circuit Court in my appeal affirmed dismissal in the absence of jurisdiction. Does not the court have a moral obligation to fulfill here, that of due process and equal protection under the law? What has become of trial by a jury of our peers that our forefathers urged? The larger question is why was defendant trying so hard to conceal the truth if it were not consciously engaged in wrongdoing. Even more egregious is Judge Goettel's complicit decisions, which he undoubtedly was aware would be potent, because "the pen is mightier than the sword," and would be difficult to challenge. To unlock that venom, one has to scrutinize his pattern of behavior on the bench, coupled with his sudden departure from the Southern District. No one, let alone a pro se litigant should be exposed to this kind of malfeasance.

Judge Goettel erred in asserting that defendant's charges of disciplinary problems by plaintiff are "legitimate non-discriminatory reasons for its actions." Plaintiff had no disciplinary problems. Rather, these reasons given by defendants were not "legitimate" reasons, but a pretext for discrimination. If these problems were real why were they not included in plaintiff's job performance evaluation of 1979 when Harvey Holmes described her demeanor and job performance as "superior" and "one of the best." Why did not defendants offer proof of legitimate non-discriminatory reasons and move to dismiss instead of resorting to a system-wide pattern of resistance to the full enjoyment of Title VII rights?

After plaintiff was denied the indexing job, she was harassed by defendants daily, from being accused of doing no work to arriving late after lunch. When her life became unbearable she would complain to a Guild representative who was more objective rather than the shop steward. In 1979, manager Franke, left the department and Harvey Holmes succeeded

him. Holmes apologized for all the harassment and "trouble" I experienced, but apology was shortlived. Because Holmes' predecessor would often visit department and saw that there was some normalcy in my life at the office, he told Holmes "not to rock the boat," by allowing plaintiff to be so complacent in the office. Soon, Holmes was telling my office colleagues who were insisting that I should be reinstated to my old job that "nobody should be sorry for Ruby," because she took them to court, referring to the NYHRC, and at the same time promising to promote her whenever a vacancy occurred.

In mid-1981, Holmes learned that my son had been admitted to an ivy league college on the West Coast, and informed me that upon my return from taking my youngster to college, I would be reinstated to an indexing position. Being skeptical about the news, I shared that fact with a Guild representative. However, when I returned to work after Labor Day, Holmes approached my desk yelling, "you are fired, get out."[2] Too

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[2] Plaintiff was very proud of her son's achievement and wished her husband had been there to share it with her. He had died earlier. Therefore, returning to work from all this elation, why would she be defiant to manager or anyone when her responsibility to her family was crucial. Why would she jeopardize losing her salary and well being to be insubordinate when that act was out of character. And why would she write letters to company vice presidents seeking their help from recalcitrant department if she had become caught up in all of this fiasco. Plaintiff was attending graduate school and had no time to expend in negative actions. There is absolutely no truth to defendants' charges. It is disconcerting to know that these men lack the courage to admit their wrongdoing instead of blaming their inadequacies on plaintiff and have the court believing them. Plaintiff joined The Times in June of 1969, working in the Editorial Board department for nearly four years as an editorial research secretary for the political and environmental writer as well as the education writer, where she had contact with the White House, governors,

numb to be shocked, and knowing that her young son depended upon her for moral and financial support, she immediately sought and found a job. For the next several weeks she worked at the Madison Square Garden Legal office. Weeks later, with the intervention of the Newspaper Guild, her job was restored. Holmes had written a memorandum to the Guild stating that I was suspended for "insubordination." There was no truth to that memorandum but the Guild discouraged me from replying because they were afraid it could exacerbate the situation. Although I was not happy with that advice, I honored it in order to keep the peace. No sooner than I returned to work for the second time in several weeks, I was accosted by shop steward Stewart Nassauer and asst. manager, Breck Jones who approached my desk and demanded that I refrained from using a pair of scissors to cut the Times newspaper, but to use a 64-inch metal ruler that was not only cumbersome, but would hurt left arm and wrist that had become infected with tendernitis as a result of heavy lifting I was forced to do. Plaintiff tried to locate a Guild representative, since shop steward had sided with management. Before a representative was found, Holmes rushed over to my desk in his usual fashion yelling "get out," you are "fired." I immediately collected my belongings and left the building. While I

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senators, congressmen as well as university and college presidents, professors, writers, etc., before moving to the Info Bank as a copy checker and finally to the Index department. Why would she go to these departments of less significance and behave with less civility is incomprehensible. She left the editorial department because she wanted to write since her degree was in English and Communication. She was not aware that the behavior manifested in the Info Bank and Index department was ever allowed let alone accepted in a professional setting.

was away my son called the office only to be told that his mother had been "fired."

On September 19 1981, plaintiff reported these incidents in a letter to the company's senior vice president of Personnel, John Mortimer seeking some remedy, but no immediate action was taken, because instead of launching a full investigation, the vice president telephoned Harvey Holmes, who denied and fabricated the truth.

In mid 1983, the indexer whose abstracts were used in a deception to the Human Rights Commission, approached plaintiff with that admission and wanted to know how she could help in reducing abuse I was experiencing in department. Together we advised the Guild about that fact and in turn complained to Industrial Relations Director, who took no action in the matter. On November 1, 1983, asst. manager asked me to demonstrate to a computer programmer who was writing a new program for the Index department, how to make editorial corrections. Minutes into the demonstration, Harvey Holmes rushed from his office yelling at plaintiff to get away from the scene and have work given to her new[3] supervi-

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[3] Phyllis Collazo joined the Index department in 1980 or '81 as a temporary typist. She was trained by plaintiff to make editorial corrections in the computer. Because her work was not up to par, I trained her three to four times until she was able to make accurate corrections. She was promoted to Harvey Holmes' secretary, then to my supervisor. (I was the only person she supervised). She became Holmes' confidant and would oftentimes index stories. Her salary was on par with that of an indexer. When plaintiff was relegated to clerical work, Marge Kurijian supervised the clerical department and did most of the clerical work, while I did the editorial corrections. When Collazo became my supervisor that arrangement changed and I was invariably ordered to do more manual work. She would often

sor Phyllis Collazo, whom he claimed would do a "better job." Plaintiff complied and returned to her desk. Later that day, she wrote a memorandum to Holmes with copies to vice president Benjamin Handelman, and the Newspaper Guild stating that she was "distressed by his lack of respect and civility" toward her. She expressed that she was aware of what department had done to block her promotion. Manager became enraged, threatened plaintiff's job and accused her of making "scurrilous" remark. Whenever Holmes caused a commotion, he would write a memorandum days later accusing plaintiff for HIS "outbursts." She reminded him that outbursts were his and not hers.

Because plaintiff was relegated to heavy lifting, a dormant scoliosis back became active causing spine to block her lungs thus affecting her breathing. To correct the problem she was slated for surgery on May 4, 1984. On April 1, 1984, three days prior to hospitalization (plaintiff was admitted four weeks ahead for tests and to have spine stretched in preparation for surgery), she was again dismissed from her job. Defendants were always devising ways to mete out disparate punishment by concocting stories and accusing plaintiff of acts of insubordination. Concerned about her insurance coverage for the surgery, plaintiff advanced $10,000.00 to the hospital to ensure payment. Days prior to surgery, the Guild advised plaintiff that her job had been restored.

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complain to Holmes that I refused work she assigned to me. There was no truth to that. Prior to my dismissal, former manager Franke returned to the department, and Collazo was relieved of her group 9 salary status and resorted to her group 2 position in another department.

On August 6, 1984,[4] plaintiff returned to work after meeting with medical director to obtain return-to-work slip and present him with copy of her operative report to ensure the seriousness of her surgery and the insertion of a Harrington rod, to which her spine was tied. She wore a complete back brace and had her surgeon communicate frequently with medical department about her progress. On the day of her return, both the director and the Index department were waiting to begin their cycle of harassment. Director removed her back brace although her surgeon warned against it, and the department accused plaintiff of leaving the office without permission, when she had difficulty walking and at no time left the office without permission.

In October, two months after plaintiff returned to work, she was falsely accused of not signing out for a piece of work and once again dismissed. When the Guild investigated the matter, charges were never corroborated, but the suspension or dismissal continued and with each disruption I was losing wages that were needed for my family's survival. It was obvious that the department was trying to terminate my job

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[4] When plaintiff returned to work on Aug 6, '84, Breck Jones' daughter and son-in-law were employed by department. His daughter was indexing stories and his son-in-law made editorials corrections. When I was dismissed a year later, Jones' son-in-law was contracted to make editorial corrections and his daughter became a permanent indexer in that department. On my return to work in August also, a new Lexis computer was installed for research purposes, but Holmes had written a memo telling the staff not to teach plaintiff how to use the computer. Holmes told most of the staff that plaintiff would be assigned to heavy manual lifting when she returned from surgery. He also stated plaintiff would be dismissed from her job. It was known by the staff that these men would meet daily to determine plaintiff's fate.

even in the midst of my trying to get well. The Guild could not contain the department's fury, so plaintiff again sought remedy from the NYHRC. Before an investigation began, the person handling my complaint left the Commission and my complaint was delayed. When it was picked up months later, my job was restored and I was again dismissed. Throughout this ordeal I maintained my composure and did not give in to the department's antics.

On January 2, 1985, Holmes called a meeting with the asst. manager, two clerical supervisors, shop steward and myself to announce that I would be responsible to lift and transport over a 100 pounds of computer material from the 7th floor to the 11th floor, although I was still wearing a back brace and would not remove it until the end of February. I informed Holmes that my surgeon advised not to lift anything exceeding twenty-five pounds but he warned that I would be "fired" if task was not done. Printouts were usually transported by two men from the office and other heavy materials were usually done by male messengers.

On January 24, 1985, the Index department sent a defamatory memorandum to the medical director with false allegations about plaintiff's work ethics and how department had become "demoralized" because I[5] was not doing any work. I was away for several days, and went to see my doctor on February 13, 1985, before reporting to the office. Arriving at the

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[5] What defendant refused to state here was that there were only three employees in clerical department, two of whom were plaintiff's supervisors. How she could contaminate her commanders in chief is not clear.

office there was a note on my desk indicating that I see medical director, Dr. Brown or be dismissed for "insubordination." I immediately went to see the medical director who accused me of "faking" my "illness" and stated that "simple" surgery should have been healed in "90 days." I reminded him that he was in frequent communication with my surgeon who had kept him abreast of my progress. He began to take reflex of both arms, then both knees. There was no reflex from right knee after many taps, then the director landed one heavy blow to right knee which was felt all the way in my right pelvis from which a bone had been removed. I told him how painful the blow was and left his office limping. When I got to my department my entire right leg ached along with pelvis. The next day my right leg to ankle was swollen. I went back to see the director and showed him my swollen leg but he dismissed it by saying I had a "history of thrombosis" in my family, to which I told him not at all.

On March 5, 1985, Dr. Robert Gabel advised plaintiff to rest for 7 days in order to get swelling of leg down. When she returned to work on March 13, her daily dose of harassment began all over again and she was ordered to do more heavy lifting. From time to time her knee would lock causing plaintiff to lose her equilibrium. It became very distressing for her because she now had an additional injury to contend with along with the removal of her back brace which left her back weak and prone to further injury. What plaintiff could not understand was the extent to which the department would go to mete out cruel and unusual punishment. She was determined however, not to lower herself to their level. She would quietly breakdown at home making sure that this cancer would not infect her family. On July 13, 1992, plaintiff had orthoscopic surgery to correct torn meniscus. Her knee has

become progressively worse and it has to be injected from time to time to lessen excruciating pain in that area.

On July 31 1985, plaintiff was about to leave for vacation when Breck Jones asked her to postpone her vacation for a week in order to complete editorial corrections, to which I agreed. By Monday, August 5, the job was complete. Returning to work on Tuesday, Holmes who usually arrived at the office an hour or two after plaintiff did, was already in his office. As I arrived at my desk, Holmes rushed from his office to my desk yelling "you are fired, get out of the building." I collected by belongings and left the building without even meeting with a representative. Days later when I met with the Guild I was told that the department charged that I made "scurrilous" remark to Breck Jones. Charges were changed to— "gross insubordination" when they were arbitrated. After my dismissal, the NYHRC terminated its investigation and issued a Right to Sue Letter on November 4, 1985.

Instead of reviewing plaintiff's preponderance of evidence, Goettel ignored it and improperly purported that her statement "to try to prove to the court that charges are true and correct," was in "reply" to motion to dismiss. That allegation is untrue. No motion was ever received, hence no reply was made. Clearly Goettel's misconduct and coverup violates the equal protection and due process clause.

The Appellate Court admonished defendants' "egregious acts" in oral argument. Yet it affirmed and condoned the district court's decision by denying plaintiff the right to remand so she can redress her grievance in a court of competent jurisdiction, but allows defendant who has harmed her to walk away completely unaccountable for the extensive harm

and loss defendant caused, therefore rewarding them for their improper behavior which is completely contrary to the right of fundamental fairness and justice.

REASONS WHY WRIT SHOULD ISSUE

I. The Petition Should Be Granted Since The Opinion Below Defies And Exceed The Limits of Federal Question Jurisdiction Previously Established By The Court in *Griggs V. Duke Power Company*

Chief Justice Burger who delivered the opinion in Griggs stated in part, "the objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the act, practices and procedures, or tests neutral on their face and even neutral in terms of intent cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."

Like Griggs, plaintiff experienced unequal employment opportunities and Title VII "disparate impact" overt discriminatory practices when test administered by the Index department unfairly measured her knowledge and skills required for that job, because while she abstracted more difficult stories than her white counterpart, the criteria used to measure those standards were based on a quantitative quota system rather than on the qualitative stories she abstracted. Besides, she was not given stories that were similar to her white counterpart to abstract, and therefore should not have been held to the same standard.

Unlike Griggs, is the fact that defendants did not see fit to present her white counterpart's work to the Human Rights Commission because they were aware that the tests given to these two employees were not similar, thereby denying plaintiff's fundamental right to equal protection and due process. Instead they presented the work of an experienced indexer covering international and political stories to not only defraud and deceive the Commission, but to give the impression that plaintiff did not have the ability to handle complex stories within a short period of time. This act was not only intentional but in absolute violation of Title VII "disparate treatment." Even if plaintiff was not deemed a fast worker, which obviously was not the case, why should she be denied employment on that basis, given the fact that her skills and professional ability would have improved as she became more efficient in her job.

Because the department knew that plaintiff's white counterpart could not efficiently and fairly compete against her, they compromised department's policy by declaring co-worker the better indexer for the job. Undoubtedly, defendants were too bias to see that an effective and high performance can be achieved by anyone regardless of his pigmentation, if only one is amenable to training and applies himself to whatever the situation, because every one has the ability to learn and excel. Evidently, defendants intentionally defied Title VII equal employment opportunity standard by deliberately setting up plaintiff to fail.

The Chief Justice stated, "the courts' efforts to tailor relief in employment cases lead naturally to consideration of employers' efforts to remedy such problems through their own affirmative action programs." Congress has now provided that tests or criteria for employment or promotion may not provide

equality of opportunity merely in a vague sense, but in a sense that is considered to be fair and meaningful, and Congress has now required that the posture and condition of the jobseeker be taken into account. Surely, defendants were aware of the intent of the law, which requires the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications.

Petitioner asks this court to consider the importance of these issues, since the opinion below not only defies Griggs but overt discriminatory practices which violate Title VII "disparate impact" for tests that unfairly measured plaintiff's knowledge and skills about her job when she was intentionally given more substantive stories than her white counterpart to abstract which reduced her daily quota, as opposed to one-line routine abstracts co-worker received which did not interfere with the meeting of a daily quota.

II. The Petition Should Be Granted Because The Supreme Court Must Exercise Its Supervisory Power When a Court of Appeals Departs So Far From The Usual Judicial Process That It Affirms An Abuse Of Jurisdiction That Denies and Violates Due Process Rights, Undermines Congressional Intent and Obstructs Justice.

Under the Fourteenth Amendment "no person shall...be deprived of life liberty or property with due process of law."

Petitioner submits that the opinion below tramples upon the fundamental rights and fairness by allowing the district court to seek res judicata and the Court of Appeals affirming in the absence of jurisdiction thus preventing plaintiff from bringing

limited suit without the court's permission. Defendants intentionally removed plaintiff's motion to set aside summary judgment dated April 5, 1987, to not only obstruct justice but to prevent plaintiff from fairly contesting a summary judgment that was granted "clearly erroneously," and without proof of service, knowing full well nothing was ever mailed to her address.

Defendants have a history of presenting false affidavits to the court thereby obstructing justice. Defendants again obstructed justice by removing documents intended for the Circuit Court of Appeals and forwarded them to the White Plains district court thereby violating plaintiff's fundamental right to fairness. Defendants presented defamatory and maliciously expunged documents to the court to intentionally harm plaintiff's character. Defendants intentionally and recklessly harmed plaintiff's health while she was recuperating from major spinal surgery, and as a result plaintiff suffers from excruciating pain from the sciatic nerve and needs complete knee replacement.

Petitioner asks this Court to grant this petition because this Supreme Court must step in when a Court of Appeals departs so far from the usual judicial process that it goes against everything the process was created for, and affirms an abuse of federal jurisdiction that defies the law of this Court and its own court, violates and denies due process rights to redress, undermines Congressional intent and obstructs justice.

III. Petition Should Be Granted In The Public Interest Of Other United States Citizens Who Stand To Be Similarly Harmed By Federal Courts That Abuse Jurisdiction And Deny And Violate Fundamental Due Process Rights.

What makes this case particularly outrageous and the need to review the Order below even more imperative, is the abuse of jurisdiction manifested in this case is only an extension of a larger pattern of jurisdictional abuse underlying this case whereby defendant has been permitted since 1986 to use the federal courts to obtain any relief they desire from the federal court lacking jurisdiction to benefit themselves and harm plaintiff. To add to this outrage, after being extensively harmed by a number of federal rulings that defendant obtained in the absence of jurisdiction, by fraud and violation of plaintiff's due process rights to fundamental fairness, it is plaintiff who has been blamed for defendants' abuse. Instead of vacating Goettel's complicit Judgment and Order, the federal court has sustained this jurisdictional abuse by issuing res judicata and sanctioning defendants false and defamatory allegations that plaintiff had a disciplinary problem on the job, despite plaintiff's challenges to these claims that defendants' memoranda and statements are replete with biased and untrue sua sponte findings that have been made, automatically believed and affirmed by the federal court in violation of her due process. Plaintiff has been deliberately harmed by not being able to be transferred from menacing department and was unable to get comparable job within the company because of defendants' intentional and disparate treatment.

To add to the outrage, after being extensively harmed both emotionally and physically plaintiff was accused of displaying disciplinary problems during her recuperative period from

surgery. She was unable to bathe or dress herself, her gait was slowed and her strength depleted. Finding the strength to be insubordinate or make scurrilous remark never entered her mind. Because of daily harassment and the heavy physical work she was forced into, she had to receive therapy three times a week and was concerned that these strenuous duties may be injurious to her health and recovery, and she was afraid that any injury to her spine could have resulted in paralysis since she was not allowed "to jar" her spine. So developing a positive mind in all this chaos was her main concern. To divert from that thinking would have been counterproductive and perhaps harmful. Clearly, defendants' violation of due process right was also a violation of the human spirit which no citizen should have to endure.

Anticipating that Holmes would not refrain from daily harassment when she returned to work, plaintiff asked her surgeon, Dr. Hugo Keim, to send letters to the medical department emphasizing the seriousness of her surgery. Here are excerpts of some of those letters.

On July 19, 1984:

> "Please be advised that the above named [Ruby Howard] patient had scoliosis spine surgery performed by me on May 4, 1984. She is confined to a total body brace neck down to her buttocks for the next several months.
>
> I have advised Ms. Howard that she may return to work as of Aug. 6th, being careful not to perform any duties that will jar her spine unnecessarily."

On August 13, 1984:

> "Please be advised that Ms. Ruby Howard should be allowed to leave work early in order to avoid the heavy rush hour traffic."

Plaintiff would arrive to work one hour earlier in order to get out before the rush hour traffic.

On February 13, 1985:

> "She still has some tenderness in the right donor site of the pelvis, but this should continue to subside especially as the weather gets warmer. She should be able to handle most of her duties at work but I would advise her against heavy bending, lifting or prolonged stooping."

On April 29, 1985:

> "She has been seeing a physical therapist who feels she should do less than she is doing...she can lift up to 25 pounds but not in excess of that."

Had these letters been read and documents about knee injury reviewed, Goettel would have noticed the conflict in dates of recovery and further injury juxtaposed against alleged disciplinary problems and be able to deduce that plaintiff would not have had the stamina to do what she was accused of. This act is clearly a violation of the right to fundamental fairness and the due process clause of the Fourteenth Amendment that is deeply rooted in our country's history and traditions.

In the preceding appeal plaintiff argued vigorously that the district court dismissed her complaint in the absence of jurisdiction, and she was deprived of participating in discovery, shut out of post pretrial conference and received no motion to dismiss from defendant under Fed. Rules of Civ.

Proc. 56. While plaintiff adhered to that procedure, her fundamental right to fairness was denied as defendants deprived her of briefs and documents they submitted to the court. Justice Powell expressed in Bakke, that "the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of color." Bakke, 438 U.S. at 289-290.

In the face of violating all these rights how could a judge make a decision in the absence of jurisdiction, and res judicata be established when defendants schemed with the court, the arbitrator and the Guild to abuse the legal process. The Second Circuit Court of Appeals stated "'equal protection of the laws' means more than merely the absence of governmental action designed to discriminate ... we firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and public interest as the perversity of a willful scheme." *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F. 2d. 920, 931 (2d Cir. 1968).

Defendants intentionally misrepresented and fraudulently concealed the facts and the truth in order to abuse the process. In the opinion of the Supreme Court, "No state law or act can prevail in the face of contrary federal law, and the federal court must search out the fact and the truth of any proceeding or transaction to determine if the Constitution has been violated." *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710,11 L. Ed 686 (1964).

Petitioner seeks review also in the public interest because if this decision is allowed to stand, it will encourage and sustain an abuse whereby a federal court can issue or affirm any order, despite the lack of jurisdiction and denial and violation of due process rights, without ever having to substantiate its jurisdic-

tion or explain itself. At the very least, the Court of Appeals should be required to explain how it could substantiate federal jurisdiction in light of this Court's prior decisions.

CONCLUSION

This case presents a question of exceptional importance regarding abuse of federal jurisdiction and the fundamental right of litigants not to be deprived of equal protection and the right to fundamental fairness, life, liberty and property without due process. If the opinion of the Court of Appeals is allowed to stand, it will do many things. It will allow a district court to exceed its limit of federal question jurisdiction in defiance of the limits previously established by this Court and upheld by the Court of Appeals. It will violate and deny plaintiff's fundamental right to due process and allow defendants who have harmed plaintiff to step away completely unaccountable for its egregious acts with the blessing of the federal courts. It will encourage defendants to continue to abuse the federal process to harm other employees since they have been allowed to get away with it.

It will undermine the Congressional intent underlying the remand provisions that are intended to protect the Constitutionality of litigants whose cases have been improperly handled by the federal courts, and will undoubtedly pose a danger to every citizen who stands to be similarly harmed as plaintiff has been. It will only be a mockery of the justice system and erode fundamental principles of fairness and justice for which the courts were created. Furthermore, it will encourage an Appeals Court to use its power to make bias exceptions to law without having to explain itself. This Court can correct these errors and abuses by granting this petition and seeing that justice is served.

Accordingly, petitioner respectfully request that writ of certiorari be granted.

Respectfully submitted,

Mrs Ruby Howard

Ruby Howard, *Pro Se*
400 Matawan Avenue
Ken Gardens #18A
Cliffwood, NJ 07721
(732) 290-7388

APPENDIX

Unpublished Opinion, United States Court of Appeals for the Second Circuit, Decided May 8, 2001

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR THE PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, Held at the United States Courthouse, Foley Square, in the City of New York, on the 8th day of May two thousand one.

Present: HONORABLE AMALYA L. KEARSE,

HONORABLE ROBERT D. SACK,

Circuit Judges,

HONORABLE JED S. RAKOFF

District Judge*.

----------x

RUBY HOWARD,

Plaintiff-Appellant,

-v.-

No. 00-9163

INDEX DEPARTMENT c/o THE NEW YORK TIMES,

Defendant-Appellee.

----------x

Appearing for Appellant: Ruby Howard pro se, Cliffwood, N.J.

Appearing for Appellee: George Freeman, N.Y. Times Co. Legal Dep't. N.Y., N.Y.

Honorable Jed S. Rakoff, of the United States District Court for the Southern District of New York, sitting by designation.

Issued as mandate 6/22/01

Howard v. Index Department c/o The New York Times. No. 009163

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the record from the United States District Court for the Southern District of

New York, and was argued by plaintiff pro se and by counsel for defendant.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed substantially for the reasons stated in Judge Kaplan's Order dated August 9, 2000, and the Report and Recommendation dated July 27, 2000, of Magistrate Judge Ronald L. Ellis. To the extent that plaintiff challenges the judgment and order that were entered against her on the merits of her prior action in 1987, this court lacks jurisdiction to consider her arguments because her time to appeal from those decisions expired in 1987, see Fed. R. App. P. 4(a)(1)(A). We also deny plaintiff's October 2000 motion to supplement the record with a copy of the pretrial conference schedule dated June 16, 1986, entered in that prior action.

We have considered all of plaintiff's contentions that are properly before us and have found them to be without merit. The judgment of the district court is affirmed.

FOR THE COURT:
ROSEANN B. MacKECHNIE, Clerk

/s/ Lucille Carr

Opinion of the United States District Court for the Southern District of New York filed August 15, 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

MRS. RUBY HOWARD,

Plaintiff,
00 Civ. 2985 (LAK)

-against-

THE INDEX DEPARTMENT c/o
THE NEW YORK TIMES,

Defendant.

----------x

ORDER

LEWIS A. KAPLAN, District Judge.

Plaintiff brings this action pro se against her former employer for alleged racial discrimination and violation of the Americans With Disabilities Act. She claims that her former employer failed to promote her, failed to accommodate her alleged disability, retaliated against her, and terminated her employment on prohibited bases. The complaint, which was filed on April 19, 2000, alleges that the alleged discriminatory acts occurred in the period 1976 through August 6, 1985. A right to sue letter allegedly was issued on November 4, 1985. It might be noted that this is the third action plaintiff has brought with

respect to her former employment, the previous litigations having been dismissed.

Defendant has moved to dismiss the complaint on grounds of res judicata and statute of limitations and for an injunction restraining further filings. In a report and recommendation filed July 31, 2000, Magistrate Ellis recommended that the motion be granted.

Plaintiff has objected to the report and recommendation. The Court has considered her objections carefully. Nevertheless, the Court has concluded that the motion to dismiss should be granted, substantially for the reasons set forth by Judge Ellis. Moreover, in view of the fact that plaintiff seems determined to continue litigating notwithstanding adverse judicial determinations of her claims, the motion to enjoin her from filing further action against defendant with respect to her prior employment there should be granted.

Accordingly, defendant's motion is granted in all respect. Plaintiff is hereby enjoined and restrained from filing any further actions in any federal court against The New York Times Company with respect to her prior employment by it without prior leave from this Court.

SO ORDERED.

Dated: August 9, 2000

/s/ Lewis A. Kaplan
United States District Judge

Copies mailed 8/10/00
Chambers of Judge Kaplan

Opinion of United States District Court Southern District of New York of March 27, 1987

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

RUBY HOWARD,

Plaintiff,

-against-

HARVEY HOLMES
c/o THE NEW YORK TIMES

Defendant.

----------x

APPEARANCES:

RUBY HOWARD
Plaintiff Pro Se
184 Bethany Road
Hazlet, New Jersey 07730

CAHILL GORDON &

REINDEL, P.C.

Attorneys for Defendant
80 Pine Street
New York, New York 10005

Of counsel:

H. Richard Schumacher, Esq.
John J. Stanton, Esq.
Patricia Dobberstein, Esq.
and
Marcijane Kraft, Esq.
Labor Counsel
The New York Times Company
229 West 43rd Street
New York, New York 10036

G O E T T E L, D.J.:

Plaintiff Ruby Howard was employed by The York Times ("The Times") from 1969 until she was discharged in 1985. She brings this action against Harvey Holmes, a department manager at The Times, alleging discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e (1982). The Times[1] moves for judgment on the pleadings or, alternatively, for summary judgment.

Background

In 1969, the plaintiff began working for The Times as a secretary in the Editorial Department. She remained in

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[1] The complaint filed with the EEOC, for which a Right to Sue Letter was issued, names both The New York Times and Harvey Holmes as respondents. The judicial complaint names the defendant as "Harvey Holmes c/o The New York Times." The Times, however, as the "employer" pursuant to 42 U.S.C. §2000e(b) (1982), is the actual defendant.

that position until November 1972, when she applied for and received a transfer to the Index Department, first as a secretary and later as a copy checker. In 1975, the plaintiff and two other employees were given an opportunity to try out for the higher paying position of assistant indexer. The plaintiff was unsuccessful, and resumed her position as a copy checker.

Shortly thereafter, the plaintiff filed charges with the New York City Commission on Human Rights ("CCHR") and the federal Equal Employment Opportunity Commission ("EEOC"), alleging that The Times had refused to promote her to the assistant indexer position because of her race and color.

The CCHR investigated the charges, and dismissed them as baseless in early 1976. The plaintiff pursued an appeal within the CCHR, but was unsuccessful. The EEOC reviewed the CCHR findings and issued a "Determination" that there was no reasonable cause to believe the plaintiff's charges were true. The EEOC advised the plaintiff that she was entitled to receive a Right to Sue Letter,[2] which was issued to her. However, the plaintiff did not initiate a civil action at that time.

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[2] A Right to Sue Letter is a prerequisite to filing a judicial complaint in federal district court. If a charge filed with the EEOC is dismissed, or if, within 180 days from the date of filing, the EEOC fails to take action on it, the claimant may request a Right to Sue Letter from the EEOC. If suit is not brought within 90 days of receipt of a Notice of Right to Sue Letter, the right to bring an action is lost. 42 U.S.C. §2000e-5(f) (1) (1982).

The plaintiff continued to work as a copy checker until December 1977, when The Times eliminated that position, replacing it with automated procedures. The Times, however, offered the plaintiff a position as an index clerk, which she accepted. This is normally a lower-salaried position than that of copy checker. But, pursuant to the collective bargaining agreement between The Times and The Newspaper Guild ("The Guild"), the plaintiff continued to receive her former salary and benefits.

Beginning in September 1981, and continuing for the next several years, the plaintiff was given numerous disciplinary warnings and at least two periods of suspensions for insubordinate behavior. On December 19, 1984, the plaintiff again filed charges with EEOC and CCHR. This time she alleged she was being disciplined in retaliation for the racial discrimination charges she filed against The Times in 1975. She specified the following actions as the basis for her retaliatory Discrimination claim: (1) The Times' continuing refusal since 1975 to promote her to the position of assistant indexer; (2) her "demotion" to index clerk in 1977; (3) a bad reference allegedly given by The Times on an unspecified date; (4) a disciplinary memorandum from plaintiff's supervisor dated October 13, 1984, warning her about her work performance; and, (5) a two-week disciplinary suspension of plaintiff, which began on October 16, 1984.

On August 6, 1985, the plaintiff's employment at The Times was terminated for "gross insubordination." Soon thereafter, the plaintiff sought relief pursuant to the grievance/arbitration procedure of the Times-Guild collective bargaining agreement. Additionally, at the request of the plaintiff, the EEOC issued a Right to Sue

Letter on November 4, 1985.[3] The plaintiff filed this action in January 1986. The judicial complaint reiterates the five allegations filed with the CCHR and the EEOC. It also alleges that her termination in August 1985 was in retaliation for the earlier charges of racial discrimination.[4]

In February 1986, the plaintiff grievance, challenging her discharge and other alleged adverse employment actions by The Times, proceeded to arbitration. The arbitration was jointly selected by the parties. Both the plaintiff and The Times were represented by counsel. The plaintiff attended all of the sessions, testified under oath on her own behalf, and was cross-examined. During the course of the arbitration proceeding, The Times presented documentary evidence demonstrating the extent of the plaintiff's disciplinary record. The arbitrator received this evidence without objection from the plaintiff's counsel.

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[3] Neither the EEOC nor the CCHR had investigated the plaintiff's charges when she requested her Right to Sue Letter.

[4] The claim of retaliatory discharge was not included in the charges filed with the EEOC in 1984. However, this court may exercise "jurisdiction...over all claims encompassed within the EEOC charge and like or related matters which might be expected to be subject to an EEOC investigation growing out of the charge." *Flesch v. Eastern Pennsylvania Psychiatric Institute*, 434 F. Supp. 963, 970 (E.D. Pa. 1977) (citations omitted). Further, the "rule is broad enough to include claims arising from new acts occurring during the pendency of the EEOC charge and reasonably related to or growing out of acts alleged in the charge." *Id.* The allegation of discriminatory discharge, which occurred after the plaintiff filed charges with the EEOC, is reasonably related to and flows from the original retaliatory discrimination claim filed with the EEOC. Therefore, this court will assert jurisdiction over the pro se plaintiff's charge of discriminatory discharge.

On July 7, 1986, the arbitrator issued his decision, finding that the plaintiff's discharge for gross insubordination was for good and sufficient cause.[5] The arbitrator concluded as follows:

> If the August 5-6, 1985 incidents were viewed in isolation, discharge would clearly be an excessive penalty. For there would be no reason to blow Ms. Howard's actions out of proportion. The fact, however, is that the incidents do not stand alone. They must be viewed in the context of her overall record.

This certainly was not Ms. Howard's first brush with managerial authority. She has been disciplined on a number of occasions in the last four years of her employment. She was suspended in September 1981. She was suspended for two weeks in April 1984. She was suspended for four weeks in October 1984. (The suspension was later reduced to two weeks.) She has, in addition, been issued a number of written warnings. The most recent was on March 4, 1985. At that time, she was clearly cautioned that if she was "guilty of any acts of insubordination in the future [she] will be instantly discharged." She was told then that if she objected "to any orders you will be expected to do the job and then file any grievances or complaints with [her] union representative."

---

[5] The collective bargaining agreement specifies that a discharge, or any other challenged employment action is permissible only upon "good and sufficient cause."

Ms. Howard, in short, has been subjected to progressive discipline. It was designed to correct her pattern of behavior at work. It has not proved successful. She simply has not responded well to the Company's corrective approach.

The Company, in my view, had "good and sufficient cause" to discharge her. It I believed there was any likelihood that she had learned a lesson, that she would comport herself properly in the future, I would be inclined to direct she be reinstated. However, I am convinced that no such likelihood exists. Ms. Howard, in my judgment, is incapable of curbing herself. She seems unable or unwilling to comport herself as a responsible employee. Under the circumstances, I am constrained to conclude the company had "good and sufficient cause" to discharge her.

Decision of Arbitrator, pp. 19-20, annexed as Exhibit 7 to Affidavit of John J.

Stanton.

After the arbitrator reported his decision, The Times moved for judgment on the pleadings in this action or, alternatively, for summary judgment. The defendant argues that the allegations of failure to promote in 1975 and demotion to index clerk in 1977 are barred by the statute of limitations. Further, The Times argues that it is entitled to summary judgment on the plaintiff's remaining allegations because the plaintiff fails to establish the requisite elements of a claim of retaliatory discrimination.

Discussion

For an alleged act of discrimination to be actionable under Title VII, the act complained of must have occurred within 300 days of the filing of charges with the EEOC. 42 U.S.C. §2000e-5(e) (1982). The failure to promote, which plaintiff alleges was discriminatory, occurred in 1975, while the allegedly retaliatory demotion occurred in 1977. Both of these incidents are well outside the statute of limitations period, and are, therefore, dismissed as time barred.

The Times moves for judgment on the pleadings pursuant to Fed. R. Civ. P. 12© or, alternatively, for summary judgment. Fed. R. Civ. P. 56. We treat this as a motion for summary judgment because matters outside the pleadings have been presented to the Court.

Initially, the party moving for summary judgment must demonstrate an absence of any genuine issue of material fact. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1355 n.10 (1986). If this showing is made, the burden shifts to the non-moving party to come forward with specific facts showing a genuine issue of material fact. Although references drawn from the underlying facts must be viewed most favorable to the non-moving party, *Id.* at 1356-57, the mere existence of some alleged factual dispute will not defeat a motion for summary judgment. The facts in dispute must be material, i.e., facts that might affect the outcome of the suit under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2510 (1986). Only if the non-moving party fails to present evidence that raises "a sufficient disagreement to require submission to a jury,"

may summary judgment be properly granted to the movant. *Id.* at 2512.

The Second Circuit recently held that summary judgment is available in discrimination suits brought under Title VII, even though there may be issues of intent. The summary judgment rule would become sterile if the mere incantation of "intent" operated to defeat an otherwise valid motion. *Meiri v. Dacon*, 759 F.2d 989 (2d Cir. 1985). Further, the purpose of summary judgment is to avoid expensive and harassing trials, and a party opposing a motion for summary judgment risks the possibility there will be no trial if she saves the evidence for trial. Id. at 998. Purely conclusory allegations of discrimination, absent any concrete particulars, are insufficient to defeat a motion for summary judgment. Id. The last point noted above aptly describes the plaintiff's allegation that, in retaliation for filing the earlier charges of racial discrimination, The Times gave her a "bad reference." The plaintiff provides no details about this alleged incident, neither when it occurred nor to whom the information was supposedly given. The Times, however, presents affidavits stating that the only references it provides for former employees consist of employment dates and job title. Further, The Times, through affidavits, states that personnel records kept in the ordinary course of business indicate no request for a reference for the plaintiff. In response to this showing, the plaintiff's mere allegation of a bad reference fails to establish a genuine issue of material fact. Hence, The Times is entitled to summary judgment on the plaintiff's "bad reference" claim.

A claim of retaliatory discrimination is evaluated in three steps. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792,

802-04 (1973). First, the plaintiff must establish a prima facie case of retaliatory discrimination. If the plaintiff successfully raises an inference of retaliatory discrimination, the burden then shifts to the defendant to rebut that inference by articulating a legitimate, non-discriminatory reason for the challenged employment actions. Once this has been done, the plaintiff must demonstrate that the articulated reasons are a mere pretext for discrimination.

1. Prima facie case.

To establish a prima facie case of retaliatory discrimination, the plaintiff must show that (a) she engaged in protected activity, such as filing discrimination charges against employer; (b) the employer was aware of this; (c) the employer thereafter took some adverse action against her; and (d) a casual connection exists between her participation in the protected activity and the adverse employment action. *Grant v. Bethlehem Steel Corp.*, 622 F.2d 43, 46 (2d Cir. 1980). See *Davis v. State University of New York*, 802 F.2d 638, 642 (2d Cir. 1986). In the instant case, it is undisputed that, in 1975, the plaintiff filed charges of racial discrimination with the EEOC and the CCHR against The Times, the latter was aware of those charges, and adverse employment actions were taken. However, we question the adequacy of proof on the final element required for a prima facie case.

A causal connection between the protected activity and the alleged retaliatory action may be demonstrated by evidence of circumstances that justify an inference of a retaliatory motive, such as protected activity closely followed by adverse actions. See *Burrus v. United Tele-*

phone Co. of Kansas, 683 F.2d 339, 343 (10th Cir. 1982). However, the plaintiff's protected activity took place in 1975 and the alleged retaliatory discrimination occurred ten years later. In view of this span of time, the causal connection is broken unless the plaintiff has additional evidence to the contrary. The plaintiff has failed to make such a showing. Her conclusory allegations of retaliatory animus are insufficient to raise an inference of retaliatory discrimination and, therefore, a prima facie case has not been established. However, because the plaintiff appears pro se, we hesitate to dismiss her action on this facial insufficiency. We will, therefore, assume arguendo that the plaintiff has established a prima facie case, and turn to the other considerations in evaluating her discrimination claim.

2. Defendant's rebuttal

If we assume that the plaintiff has established a prima facie case, the burden shifts to the defendant to state a legitimate, non-discriminatory reason for its actions. The Times cites numerous incidents of disciplinary actions imposed on the plaintiff over a prolonged period of time. In September 1981, the plaintiff was suspended for three days without pay for insubordination; in October 1983, she received a written disciplinary warning for remarks made about her immediate supervisor, Phyllis Colazzo; in November 1983, a disciplinary memorandum was sent to the plaintiff warning her that she would be dismissed if she continued making unprovoked outbursts and unsubstantiated charges; also in November 1983, she received a written disciplinary final warning directing her to follow office rules on pain of dismissal; in April 1984, the plaintiff was suspended without pay for insubordination;

twice in August 1984, the plaintiff was reprimanded for leaving work early without permission; in October 1984, the plaintiff received the disciplinary warning memorandum and the two-week suspension that she challenges in the instant action; in January 1985, the plaintiff received a disciplinary warning for disobeying office rules; in February 1985, in a meeting attended by the plaintiff, The Guild, and The Times, she was given a final disciplinary warning, and received a written confirmation of it in March 1985; and finally, on August 6, 1985, the plaintiff was discharged for gross insubordination.

In addition to the plaintiff's disciplinary record, the defendant cites the decision of the arbitrator as evidence that its actions were legitimate and non-discriminatory. While we are not bound by the arbitrator's decision, it is admissible as evidence and may be accorded such weight as the Court deems appropriate. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 (1974). We find compelling the arbitrator's decision that the plaintiff was dismissed for cause and not for reasons of discrimination. We further conclude that it adds great weight to the other documentary evidence submitted by The Times.

3. Showing of pretext by plaintiff.

To the extent the defendant, as here, substantiates a legitimate, non-discriminatory reason with a factually supported basis, such as documentary evidence, the plaintiff's task of showing pretext will be more difficult. See *Wade v. New York Telephone Co.*, 500 F. Supp. 1170, 1178 (S.D.N.Y. 1980). In Wade, the defendant employer's articulation of a legitimate, non-discriminatory reason for the alleged acts of racial discrimination were factually

supported with affidavits, an arbitral decision, and an EEOC determination that there was no reason to conclude the plaintiff's allegations were true. The plaintiff did not submit any proof or even allude to how she hoped to prove pretext at trial and, consequently, her mere conclusory allegations failed to overcome the defendant's showing. Similarly, while plaintiff Howard states that she "will try to prove to the court that her charges are true and correct," plaintiff's Reply filed November 7, 1986, at 1, she does not even allude to how she intends to prove pretext, other than to say she will "present testimony to substantiate her claim." Plaintiff's Reply filed November 25, 1986, at 3. She has, therefore, failed to meet her burden of demonstrating that the defendant's articulated reasons are a mere pretext for discrimination.

The plaintiff's claim was unsuccessful in the arbitration proceeding and she presents no new evidence of facts in opposition to this motion for summary judgment. She attempts, as she did in the arbitration proceedings, to support her claim of retaliatory discrimination with conclusory allegations. She has not come forward with specific facts demonstrating a genuine issue of material fact for trial. Accordingly, the defendant is entitled to summary judgment.

Conclusion

In summary, we dismiss as time barred the plaintiff's allegations regarding the defendant's failure to promote her in 1975 and her "demotion" to the position of index clerk in 1977. We grant summary judgment for the defendant on the plaintiff's claim of being given a "bad

reference," since no facts were put forth to establish a genuine issue of material fact. We further grant the defendant's motion for summary judgment on the plaintiff's claims of retaliatory discrimination because, even if the plaintiff has established a prima facie case, which is dubious, she fails to overcome the defendant's articulation of legitimate, non-discriminatory reasons for its actions. The clerk will enter judgment for defendant.

SO ORDERED

Dated: White Plains, N.Y.
March 27, 1987

Signed GERARD L. GOETTEL
U. S. D.J.

Court of Appeals Order Denying Motion for Reconsideration dated June 20, 2001

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION INFORMATION FORM

Docket No. 009163

Howard

V

Index Department

Ruby Howard
P.O. Box 8336
New York, NY 10036

ORDER

Before: Hon. Amalya L. Kearse, Hon. Robert D. Sack, C.J.J., Hon. Jed S. Rakoff, D.J.

IT IS HEREBY ORDERED that the motion for reconsideration be and it hereby is DENIED.

FOR THE COURT;

ROSEANN B. MACKECHNIE, Clerk

by
/s/ Beth J. Meador
Administrative Attorney

Date: Jun 20, 2001

*The Honorable Jed. S. Rakoff, of the United States District Court for the Southern District of New York, sitting by designation.